No. ~~01-2277~~ 02-540

In the

Supreme Court of the United States

CITY OF FERGUSON,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF FIREFIGHTERS OF ST. LOUIS, FRANKLIN AND JEFFERSON COUNTIES, LOCAL 2665; LLOYD THOMPSON; and ALMA MENDEZ-THOMPSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Eighth Circuit was correct in not deciding the constitutionality of a City Charter without ordering the District Court to first examine the State of Missouri pendent claim and the effect of the Missouri statutory enactments and policy on a City's Municipal Charter Provisions, some of which had been declared void for vagueness, without appeal in this action, as both relate to certain political activity, speech, standing and associational rights subject to State and Federal Constitutional protections, privileges, rights and authority?

Whether, to the extent that a co-plaintiff spouse of a municipal employee asserts her own rights, she maintains standing to engage in direct and/or indirect political activity in relation to placing yard signs or maintaining joint bank accounts with her public employee spouse without suffering economic or compensatory loss?

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STATEMENT OF THE CASE

A. Introduction

This case involves a challenge to a provision of the City of Ferguson Charter which prohibits certain political activities under its Section 5.3 by City employees. Mr. Lloyd Thompson, a Ferguson resident as an employee and his wife, Alma Mendez-Thompson, challenged the constitutionality of the Section. Mr. Thompson was employed as a firefighter. The District Court determined that the Plaintiffs prevailed in their claim that the Charter was void for vagueness to the extent that it prohibits City employees from engaging in "sponsoring", directly or indirectly, candidates for the City office of Mayor or Council.

The action was brought under 42 U.S.C. Section 1983, and alleged that Section 5.3 of the City Charter violated rights guaranteed under the First and Fourteenth Amendments and was also contrary to a provision of the Missouri law, Section 130.028, RSMo., which prohibited cities from forbidding employees to make political contributions and in engaging in otherwise protected partisan activity in regard to candidates for local offices and public issues. Mr. Thompson informed his wife, Mendez-Thompson that she would be unable to run for City Council because of Mr. Thompson's belief that he would lose his job if she became active. Mrs. Thompson alleged that she has not been active in City politics because of her concern that her husband's job would be in jeopardy. No written regulations interpret the City Charter provisions nor do they further define sponsorship or political activity. No mention in the City Charter pertains to the issue of yard signs, although the Missouri Court of Appeals has held that the City Charter was impermissibly vague and

unconstitutional in 1984, because it violated the First Amendment rights, and freedom of speech and association protections of police officers pursuant to the terms of the Missouri Constitution, Article 1, Sections 8 and 9. In that action, the Court determined that the police officers' union had standing as a labor organization to bring the legal action. *Ferguson Police Officers Association v. City of Ferguson*, 670 S.W.2d, 921 (Mo. App. 1984). See also *Missouri National Educational Assoc. v. Missouri State Board of Education*, 34 S.W.3d, 266 (Mo.App. W.D. 2000). The District Court ruled that Alma Mendez-Thompson lacked standing and was not a proper party plaintiff. City administration officials have solicited the support of employees to engage in activities pertaining to non-partisan political activity in relation to, for example, bond issues. The City presented no evidence that it conducted a study, provided standards, guidelines or safeguards to determine the possible impact of allowing employees to speak freely on behalf of candidates for Mayor or City Council. Elections for Mayor and City Council are non-partisan.

In the factual background pertaining to this case, Ms. Mendez-Thompson alleged that the City of Ferguson has threatened to interpret its Charter in such a way as to chill her own exercise of otherwise protected First Amendment rights. Her concerns are that the Charter provisions in question prevent her from participating in political activities such as working in campaign offices or making telephone calls on behalf of candidates because of the discipline to be imposed upon her husband if she either ran for office, electioneered or contributed money to a candidate for either Mayor or the City Council race. The Mayor, in deposition, took the position that if an employee's spouse or children placed a yard sign in front of their residence, they could

be indirectly engaging in political activity otherwise prohibited by the Charter. As such, First Amendment protections are at issue but subject to necessary review on remand in light of the Eighth Circuit's ruling and specific facts of this case in conjunction with the status of Missouri law.

REASONS FOR DENYING THE WRIT

The Eighth Circuit was correct in directing the District Court to redetermine the propriety of the District Court's dismissal of the pendant, or supplemental state claims. The Missouri Statutes Section 130.028 (2001) provide that there shall be no discrimination against any employees or persons in the State of Missouri with respect to employment rights and as such, an employee may not be terminated for contributing to a political candidate. The Court entered this decision in *Guy v. City of St. Louis*, 829 S.W.2d 66 (Mo. App. 1992) after an analysis of both the State law and the statutory and organic contexts. A plain reading of the Missouri law supports the Plaintiffs' position in such respects.

Plaintiffs are well aware of the Court's rulings on the issue of balancing rights to political free speech against any state-wide interest in restricting employees' speech. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947); *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), but point out that the government must still be able to satisfy a balancing test to maintain a statutory restriction on any employee's

speech. As such, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court ruled that in order to survive a vagueness challenge, a "statute must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," and 'provide explicit standards for those who apply [the statute]'". The case at bar, as in *United States v. National Treasury Employees Union*, 513, U.S. 454, 466-67 (1995), involves the application of *Pickering* to an impermissible prohibition in the City Charter which restricts all speech of all resident employees (*and their families*) of the entire City. See *City of Ladue, et al., v. Gilleo*, 512 U.S. 43 (1994). That is why the Court sent the case back for remand. Here, there has been no evidence that the City of Ferguson restrictions will support any compelling interest. The Missouri claims under state law are brought under Article 1, and Sections 8 and 25 of the Missouri Constitution.

As the Court held in *Reeder v. Kansas City Board of Police Commissioners*, 733 F.2d 543, 549, (C.A. Mo. 1984), the State of Missouri has the power to make its own legislative choices on such matters providing such choices do not exceed the State's constitutional power under the First Amendment. As to the overall development of the record, in this case, as Judge Loken stated in his concurrence, Plaintiff Lloyd Thompson would have standing to argue the Charter violates his First Amendment protections if he were fired because his wife engaged in political activity to the extent that the Charter would be construed to apply to her political activity. As such, Lloyd Thompson has a First Amendment claim based upon the Charter's chilling effect on his wife's freedom to engage in political activities. This could serve to moot other issues of standing. Although this issue was raised in the District Court, the Plaintiffs, upon remand, would be free to call

it to the Court's attention with formal amendment to the pleadings on the mandated remand. *Foman v. Davis*, 371 U.S. 178 (1962). Nothing new here rises to the level of certiorari review and sound rationale exists for remand and continuing development of the record, if necessary, for reasons of judicial uniformity and economy.

CONCLUSION

Respondent respectfully requests the Court to deny the Writ.

Respectfully submitted,

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